Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1807

GEORGE BURGIO,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Second Circuit

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit

Petitioner George Burgio respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 22, 1978.

OPINION BELOW

The unreported order of the Court of Appeals affirming petitioner's conviction appears as Appendix A

to this petition. No opinion was rendered by the District Court for the Eastern District of New York, Honorable Jack B. Weinstein.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 22, 1978, and this petition for certiorari was filed within thirty days of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution, the defendant's right to the effective assistance of counsel of his choice is violated by cross-examination concerning his financial arrangements with his trial counsel.

2. Whether reversible error is committed when a prosecutor argues to the jury in summation that the government would not have prosecuted the defendant unless he was guilty.

3. Whether due process of law is violated by a jury instruction equating the defendant's testimony to that of informers and accomplices, and calling special attention to the defendant's "vital interest" in the outcome of the trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment, Due Process Clause:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Constitution of the United States, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner George Burgio was charged with conspiring to possess with intent to distribute a number of controlled substances, including sodium secobarbital, marijuana, phencyclidine, amphetamines and cocaine, in violation of 21 U.S.C. §§ 846, 841(a). At his trial the two principal government witnesses were James Girardi and Alfred Caruolo, both of whom were alleged accomplices of petitioner, awaiting sentence and testifying under a plea agreement between their attorneys and the government (RT 64, 65, 165).[1]

According to Girardi, he and Burgio began flying marijuana to New York from the West Coast in 1971 (RT 69-72). In 1972 they bought a pickup truck in which they transported approximately 200 pounds of marijuana (allegedly located by Burgio in California)

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[1] "RT" refers to the Reporter's Transcript of the trial held December 19-22, 1977.

to New York, where Girardi sold it (RT 80-81). Between January 1973 and July 1974, according to Girardi, he and Burgio operated under a plan whereby Burgio located and acquired marijuana in California, other persons were hired to drive it to New York, and Girardi sold it in the New York area. It was estimated that about six such trips occurred, each consisting of up to 400 pounds of marijuana (RT 84). Included in these loads was some cocaine (RT 86-88) and, in the fall of 1973, amphetamines (100,000 tablets) and seconals (85,000 tablets) (RT 90-93).

Girardi also testified that, in early 1974, he and Burgio acquired a pill press in California and produced over 200,000 phencyclidine tablets which they then distributed (RT 104-106). By this time Burgio, a native of New York, had moved to California. Girardi joined him there in mid-1974, and the two men opened a store in Los Angeles selling Indian jewelry. In 1975 they had a falling out, and Girardi returned to New York. Prior to his return, according to Girardi, he and Burgio helped pack over 100,000 seconal tablets into a suitcase for Alfred Caruolo to take back to New York.

Alfred Caruolo was arrested with a large number of seconals in December of 1974. Initially, he told federal agents that his source for these was one "McCarthey" (RT 152), and he produced a telegram in that name to support his story. Later he recanted this story, and at trial he testified that Burgio and Girardi were his sources. He supported Girardi's testimony that the three of them had packed the seconals

into a suitcase in California, and that he had brought it to New York for distribution (RT 199). The pills with which Caruolo was arrested in 1974 were introduced in evidence below, and constituted the only drug evidence offered by the prosecution.[2]

Burgio, testifying in his own behalf, flatly contradicted Girardi and Caruolo. He testified that, while he knew that Girardi and his friends were engaged in drug dealing, he was not involved, and that his business contacts with Girardi were restricted to their legitimate jewelry business (RT 353). He testified that Girardi bore him ill will as a result of their business dispute. He denied any drug involvement with Alfred Caruolo (RT 363).

On cross-examination of Burgio, the prosecutor was permitted, over objection, to question Burgio extensively about his present occupation and financial condition[3] (R 401-409). After pursuing this line of inquiry for some time in an effort to show that Burgio presently lived beyond his apparent means, the prosecutor questioned Burgio, over repeated objections, about his attorney arrangements, including the number of attorneys representing him, the total fee and the portion paid, the presence of an investigator, and

---

[2]There was testimony from a California police officer that Burgio possessed marijuana and other drugs when his van was stopped in 1972, and from a DEA agent that a driver's license application bearing Burgio's name was found in a California residence when drugs were seized there in 1973 (RT 288, 307-308). In both of these cases, however, the alleged drugs had been routinely destroyed by law enforcement officers long before this trial.

[3]The conspiracy charged in the indictment was alleged to have terminated in 1975 with the arrest of Caruolo and the efforts to mislead federal agents about his source (Appendix B).

the fact that his lawyers had come from California to represent him (R 422-523). After permitting this evidence, the trial judge told the jury, in substance, that there was nothing improper in the arrangements disclosed and that Burgio had a right to defend himself. Burgio's counsel moved for a mistrial, which was denied (RT 437-438).

In his closing argument to the jury, the prosecutor, claiming that defense counsel had "implied" that Girardi and Caruolo were "put up to their testimony" by the government, commented as follows:

> "Don't you think there are enough guilty narcotics dealers in the United States that we don't have to drum up a case against an innocent person? Do you think our salaries depend on whether we convict George Burgio? Why should we do such a thing unless he was guilty?" (RT 513-514).

The court sustained an objection to this comment, and instructed the prosecutor to "go on to something else" (RT 514).

In its charge to the jury, the trial court gave several standard instructions concerning the credibility of witnesses, including those which say that the testimony of "accomplices" and "informers" should be "examined and weighed with great care" (RT 524-526). Immediately following these instructions, the court gave the following charge, objected to by the defendant:

> "The defendant is competent as a witness. He voluntarily took the stand, although he didn't have to. His testimony should not be disbelieved merely because he is a defendant and you may, as in the case of an accomplice, or informer, rely on so much of it as you believe. In weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of the trial and you may consider his prior statements and explanations of them in assessing his credibility" (RT 526).

Petitioner was convicted, and the Court of Appeals affirmed with a brief unpublished order (Appendix A). Although it found "no doubt" that the prosecutor's comment was "not only intemperate but improper," the court found that "no reversible error was committed."

Jurisdiction of the court of first instance, the United States District Court for the Eastern District of New York, was predicated on 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ALLOWING CROSS-EXAMINATION OF PETITIONER CONCERNING HIS ATTORNEY FEES AND ARRANGEMENTS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Although the Court of Appeals did not discuss this issue in its unpublished order of affirmance, the point was vigorously briefed and argued by both parties in the courts below.[4] The government argued, in essence, that this was simply another expenditure properly the

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[4] In view of the failure of the opinion below to discuss the issue, petitioner has appended as Appendix C his trial counsel's affidavit filed with his new trial motion in the district court.

subject of inquiry; petitioner urged that to permit such inquiry, at least in the absence of a strong showing of relevance, placed an impermissible burden on his exercise of the right to counsel of his choice (Appellant's Opening Brief, pp. 17-22).

We urge this Court to grant certiorari to settle the important question of whether a defendant's choice of counsel may be taxed in this way. While fee arrangements have been held non-privileged in a grand jury setting, see *Michaelson v. United States,* 511 F.2d 882 (9th Cir. 1975), we have found no reported decision allowing cross-examination of a defendant on trial concerning his fee arrangements with his trial attorney.

It is well settled that a fundamental constitutional right is denied if the person asserting it is in any way penalized for doing so. *Griffin v. California,* 380 U.S. 609 (1965). No better expression of this principle can be found than Mr. Justice Black's concurrence in *Grunewald v. United States,* 353 U.S. 391, 425 (1957):

> "There are no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on theirs. It seems peculiarly incongruous and indefensible for courts which exist and act only under the constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the constitution."

This Court has held that "the assistance of counsel is one of the safeguards of the Sixth Amendment

deemed necessary to insure fundamental human rights of life and liberty." *Gideon v. Wainwright,* 372 U.S. 335 (1963). Included within the scope of this guarantee are the rights to counsel of one's choice, *United States ex rel. Davis v. McMann,* 252 F. Supp. 539 (N.D.N.Y. 1966), *aff'd,* 386 F.2d 611 (2d Cir. 1967), *cert. denied,* 390 U.S. 958, and to be represented with zealous and undivided regard for the client's interest. *United States v. Wisniewski,* 487 F.2d 274 (2d Cir. 1973).

Petitioner's exercise of these rights was unquestionably penalized by the cross-examination allowed here. Through petitioner the prosecutor brought out that two lawyers had journeyed from California to represent him, accompanied by an investigator, and that their total fee was in excess of $25,000, of which $8,000 to $10,000 had been paid. From this, together with other evidence of petitioner's present lifestyle, the prosecutor argued that petitioner was presently engaged in the drug traffic.

While the government argued below that the evidence of present expenditures was relevant to petitioner's credibility as a witness, the fact is that the alleged conspiracy terminated in 1975, and petitioner's direct testimony did not touch his financial condition at or near the time of trial.

Even if it is assumed that some inquiry into petitioner's present expenditures was proper, this should not authorize a prosecutorial foray into the sensitive area of petitioner's arrangements with his trial counsel. Other evidence of recent expenditures was avail-

able and brought out. Thus the objected to evidence was at best cumulative and unnecessary; at worst it was totally irrelevant. In either case it should have been excluded in view of the strong countervailing considerations of constitutional policy and simple fairness. For this evidence was almost certainly calculated to prejudice the jury against petitioner, arousing in them the not uncommon assumption that only the guilty will be able or willing to spend lavishly on legal representation.

In *United States ex rel. Macon v. Yeager,* 476 F.2d 613, 615 (3d Cir. 1973), the Third Circuit reversed a conviction on the basis of a prosecutorial comment on a defendant's consultation with an attorney after the crime was committed, but before he was charged, holding that such comment constituted "a 'penalty' on the free exercise of a constitutional right." We respectfully urge that a similar penalty was exacted in this case, and urge the Court to grant certiorari to consider this important question.

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2. **THE PROSECUTOR'S COMMENT THAT PETITIONER WOULD NOT HAVE BEEN PROSECUTED UNLESS HE WAS GUILTY CONSTITUTED REVERSIBLE ERROR: THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE FIRST AND FIFTH CIRCUITS IN THIS AREA.**

In his closing argument the prosecutor, charging that petitioner's counsel had "implied" that the government put the accomplice witnesses up to their testimony, made the following statement:

> "Don't you think there are enough guilty narcotics dealers in the United States that we don't have to drum up a case against an innocent person? Do you think our salaries depend on whether we convict George Burgio? Why should he do such a thing unless he was guilty?" (RT 513-514).

The Court of Appeals, although it found this comment "not only intemperate but improper," nevertheless concluded that "no reversible error was committed." In so holding the court remarked that the trial judge promptly sustained petitioner's objection, and expressed the view that the comment was "provoked in part by defense counsel's suggestion that the government had prepared scripts for its witnesses in an effort to secure conviction."

Faced with similar comments and similar allegations of provocation, the Fifth Circuit has found reversible error. *McMillian v. United States,* 363 F.2d 165, 169 (1966); *Hall v. United States,* 419 F.2d 582, 587 (1969). See also *Dunn v. United States,* 307 F.2d 883, 885 (5th Cir. 1962). Similarly, in *Greenburg v. United States,* 280 F.2d 472 (1st Cir. 1960), the prosecutor argued his belief in the evidence and the consequent guilt of the accused. Quoting from the canons of Professional Ethics of the American Bar Association, the court reversed the conviction.

While all courts agree that such comments are improper, some have shown more reluctance in finding the misconduct reversible. See, *e.g., Henderson v. United States,* 218 F.2d 14, 19 (6th Cir. 1955), *cert. denied,* 349 U.S. 920. This latter tendency is exem-

plified by the Court of Appeals' decision in this case. We submit that such comments should constitute reversible error in the absence of clear and convincing justification. Otherwise it will be all too easy for the government, having taken the benefit of its impropriety, to avoid the consequences.[5] It is all too easy for the government, on appeal, to fashion in retrospect some real or fancied comment by defense counsel into a "provocation" by implication.

We urge the Court to grant certiorari to resolve an apparent conflict among the circuits and to settle this important question of federal law.

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3. DUE PROCESS OF LAW WAS VIOLATED BY THE COURT'S CHARGE CONCERNING PETITIONER'S CREDIBILITY; THE CIRCUITS ARE NOT IN AGREEMENT ON THE MATTER AND THIS COURT HAS NOT CONSIDERED IT DIRECTLY IN THE PRESENT CENTURY.

The trial court instructed the jury that the testimony of an "accomplice" should be considered "with caution and care," and that that of an "informer"

[5]The consequences of the reluctance of many appellate courts to reverse for prosecutorial misconduct are strikingly presented by a remarkable article, *Sticks and Stones May Break My Bones, But Names are the Stuff of Reversible Error: The Limits of Prosecutorial Namecalling in California*, in the February 1978 issue of the California District Attorneys Association's Case Digest. In this piece the author undertakes to advise prosecutors of "what guardedly may be termed the sanctioned epithets in California." There follows an alphabetical list of some twenty-five such epithets, from "animal" through "filthy pervert" and "piece of garbage" to "Yellow rat," each backed by an appellate case allegedly sanctioning its use. A perusal of the cited cases shows that in many, if not most, the conduct was deplored as unworthy of the prosecutor's office but found non-reversible. *E.g., People v. Ramey*, 202 Cal. App. 2d 856.

"must be examined and weighed with great care because you have to determine whether that evidence was given because of its truthfulness or because of prejudice or interest" (RT 125-126). Immediately thereafter the court, over objection, gave the following charge:

> "The defendant is competent as a witness. He voluntarily took the witness stand, although he didn't have to. His testimony should not be disbelieved merely because he is a defendant and you may, as in the case of an accomplice, or informer, rely on so much of it as you believe. In weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of the trial and you may consider his prior statements and explanations of them in assessing his credibility." (RT 525).

The appropriateness of any instruction calling the jury's attention to the defendant's vital interest in the outcome of the trial in judging his credibility has continually been the object of conflicting opinions by the Courts of Appeal, with little guidance from this Court since *Hicks v. United States,* 150 U.S. 442 (1893), and *Reagan v. United States,* 157 U.S. 301 (1895).

Although the giving of this type of instruction is approved in several jurisdictions, the Seventh Circuit has recently expressed serious reservations about its use and the Eighth Circuit has consistently and strongly disapproved it. A recent case, *United States v. Bear Killer,* 534 F.2d 1253 (8th Cir.), *cert. denied,* 97 S. Ct. 129 (1976), highlights the disagreement

among the circuits. The appellate court found it difficult to understand why the instruction was given in disregard of its repeated admonitions that the defendant should not be singled out, carrying the risk that the error would be found prejudicial. It found that the trial judge, who was from the Fifth Circuit, was not informed by defense counsel that the Eighth Circuit's law on the subject differed from that in his own circuit. Again in *United States v. Brown,* 453 F.2d 101 (8th Cir.), *cert. denied,* 405 U.S. 978 (1971) and in *United States v. Standing Soldier,* 538 F.2d 196 (8th Cir. 1976) the Eighth Circuit expressed its strong preference for a general instruction as to credibility rather than one singling the defendant out.

The Seventh Circuit in *United States v. Saletko,* 452 F.2d 193 (7th Cir.), *cert. denied,* 405 U.S. 1040 (1971) expressed its dissatisfaction with the self-interest instruction and stated that the defendant should not be singled out, but found that no prejudice resulted in that case.

The Second Circuit has consistently approved such instructions, as long as they point out that a defendant's interest in the outcome is not necessarily inconsistent with the capacity for truthfulness. *United States v. Floyd,* 555 F.2d 45 (2d Cir. 1977); *United States v. Martin,* 525 F.2d 703 (2d Cir. 1975).

We urge the Court to grant certiorari to resolve this important question of federal criminal law.

Additionally, we point out that the charge in this case went beyond mere reference to petitioner's in-

terest in the case. It specifically related him to accomplices and informers, whose testimony the court had already said should be received with caution and weighed with care. Taken as a whole, this particular charge substantially denigrated petitioner's credibility, leaving the jury free, "as in the case of an accomplice, or informer, [to] rely on so much of it as you believe." Even if a simple reference to a defendant's interest is permissible, this charge, we submit, was error.

CONCLUSION

For the foregoing reasons petitioner respectfully urges that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that court.

Dated: June 16, 1978

Respectfully submitted,

WILLIAM L. OSTERHOUDT,
SINGER & OSTERHOUDT,
Attorney for Petitioner
George Burgio.

(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
for the
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of May, one thousand nine hundred and seventy-eight.

Present:

Hon. William H. Mulligan,

Hon. Ellsworth A. Van Graafeiland,
Circuit Judges

Hon. Lloyd F. Mac Mahon,
District Judge*

Dkt. 78-1054

United States of America,
Appellee,
—against—
George Burgio,
Appellant.

The judgment of conviction is affirmed.

There is no doubt that the prosecutor's comments on summation which indicated that the government would not have prosecuted the defendant unless he was guilty, were not only intemperate but improper. However, the trial judge promptly and emphatically sus-

*United States District Judge for the Southern District of New York, sitting by designation.

tained the objection made. The remarks of the prosecutor were provoked in part by defense counsel's suggestion that the government had prepared scripts for its witnesses in an effort to secure conviction. Under all the circumstances we consider that no reversible error was committed. *United States v. Zayas,* Dkt. 77-1465, slip op. 2829, 2832-33 (2d Cir. April 28, 1978).

/s/ William H. Mulligan
Hon. William H. Mulligan

/s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland
Circuit Judges

/s/ Lloyd F. Mac Mahon
Hon. Lloyd F. Mac Mahon
District Judge

Appendix B

United States District Court
Eastern District of New York

77 CR 513
(T. 21, U.S.C., §846,841(a)(1)).

United States of America

—against—

George Burgio,
Defendant.

[Filed Oct. 6, 1977]

INDICTMENT

The Grand Jury Charges:

From in or about and between July, 1971 and the 28th day of August, 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant George Burgio, together with James Gerardi, Robert La Rocca, Alfred Caruolo, Wayne Saunders, Brian Cutrell, Fred Carment, Janet Noss, Robert Weitzman, John Doe, also known as "Wally", John Doe, also known as "Sal", named herein as co-conspirators but not as defendants, together with others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree

to violate Section 841(a)(1), Title 21, United States Code.

1. It was a part of said conspiracy that the defendant George Burgio and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute large quantities of pills containing sodium secobarbital, a Schedule III controlled substance.

2. It was further a part of said conspiracy that the defendant George Burgio and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute large quantities of marijuana, a Schedule I controlled substance.

3. It was further a part of said conspiracy that the defendant George Burgio and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute quantities of cocaine, a Schedule II narcotic drug controlled substance.

4. It was further a part of said conspiracy that the defendant George Burgio and co-conspirators would knowingly and intentionally manufacture, distribute and possess with intent to distribute large quantities of phencyclidine, a Schedule III controlled substance.

5. It was further part of said conspiracy that the defendant George Burgio and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute large quantities of tablets containing amphetamines, a Schedule II controlled substance.

6. It was further a part of said conspiracy that the defendant and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846).

A True Bill

/s/ .....
Foreman

/s/ David G. Trager
David G. Trager
United States Attorney
Eastern District of New York

A true copy. Attest, dated 10/6/1977.
Lewis Croel
Clerk
By Rae Smith
Deputy Clerk

Appendix C

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Attorneys for Defendant
George Burgio

United States District Court
Eastern District of New York

Case No. 77-CR-513

United States of America, Plaintiff,
vs.
George Burgio, Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of California

City and County of San Francisco—ss.

I, William L. Osterhoudt, after being duly sworn, depose and say:

1. I am an attorney admitted to practice before the courts of the State of California, and federal trial and appellate courts of that state. I am a partner in

the firm of Singer & Osterhoudt, with offices in San Francisco, California.

2. Our firm was retained by George Burgio to represent him following his arrest on the indictment in the instant case. Both my partner Mr. Singer and I spoke with Mr. Burgio and attempted to familiarize ourselves with his case. At some point it was decided, between Mr. Singer and myself, that I would try the case, but that he would accompany me to assist me in such matters as might arise during trial. It was also decided that Mr. Singer would not participate in the trial itself. This was because, in our judgment, it may be prejudicial to a defendant if more than one counsel is participating in trial proceedings.

3. When I met with Mr. Appleby, the Assistant United States Attorney, in his office on December 16, 1977 (the Friday before trial) he asked me if Mr. Singer would be in New York too for the Burgio case, and I replied that he would. Mr. Appleby gave me no reason to believe that he would utilize this fact in cross-examining Mr. Burgio. On Sunday, December 18, (the day before trial) Mr. Singer, at my request, went to Mr. Appleby's office to receive some discovery materials.

4. During trial Mr. Singer took no part in the trial proceedings, remaining (for most of the proceedings) in the spectator section of the courtroom. Thus prior to Mr. Appleby's questions to Mr. Burgio, the jury would have no reason to associate him with Mr. Burgio or with his defense.

5. At the point during Mr. Appleby's cross-examination when he elicited, over my objection, from Mr. Burgio the amount of his legal fee, I observed the jury. Several jurors appeared to be affected by the answer, and two made audible sounds which resembled a "whistle" and were exclamatory in nature.

6. In my judgment the conduct of the prosecutor in bringing out this evidence, for which my client and I were totally unprepared, was extremely prejudicial to Mr. Burgio, and this prejudice was compounded by the stress laid on the matter by the prosecutor in his summation to the jury.

/s/ William L. Osterhoudt
William L. Osterhoudt

Subscribed and sworn to before me this 13th day of January, 1978.

(Seal)

Evelyn C. Bodell
Notary Public—California
San Francisco County

My Commission Expires October 31, 1981

Supreme Court, U. S.
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OCTOBER TERM, 1978

GEORGE BURGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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PHILIP B. HEYMANN,
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1807

GEORGE BURGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1978. The petition for a writ of certiorari was filed on June 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in permitting the prosecutor to cross-examine petitioner concerning the amount of his attorneys' fees.

2. Whether the prosecutor's comments during summation constituted reversible error.

3. Whether the instruction to the jury on petitioner's interest in the outcome of the case was proper.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of the New York, petitioner was convicted of conspiring to distribute a variety of controlled substances, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment, to be followed by a ten-year term of special parole. The court of appeals affirmed without opinion (Pet. App. A).

1. The evidence at trial showed that between 1971 and 1975 petitioner and James Gerardi[1] were partners in a drug distribution scheme involving the transportation of narcotics from California to New York (Tr. 69-70). Their business included distributing marijuana, amphetamines, secobarbital, phencyclidine, and cocaine (Tr. 90-102). Petitioner moved to California to run the west coast operation, which involved locating sources of marijuana and couriers to transport the drugs to New York, while Gerardi directed the distribution of the drugs on the east coast (Tr. 84-88).

2. At trial petitioner testified in his own defense. The thrust of his testimony was that although many of his friends, including Gerardi, were dealing in narcotics, he was not (Tr. 362-363, 428-429). He said that he and Gerardi had a furniture business in New York and that they later invested in a jewelry store in California (Tr. 358, 364-368).

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[1]Prior to trial Gerardi had pleaded guilty to a conspiracy charge essentially the same as that upon which petitioner was tried.

In his direct examination, petitioner testified that he had limited funds during the period referred to in the indictment. He said that he went to California with a small amount of money (Tr. 345), that his money ran out (Tr. 347), that he had to borrow money from his father (Tr. 348, 368), and that the woman with whom he lived collected social security payments (Tr. 357, 362). During cross-examination, however, the prosecutor elicited that petitioner lived in a house in a wealthy suburb of Los Angeles, that he owned two expensive foreign cars and a 19-foot motorboat, that he had taken a trip to Thailand with his wife (Tr. 424-425), and that he had paid his attorney $8,000 to $10,000 in fees (Tr. 422-423).

Counsel subsequently moved for a mistrial on the ground that the question relating to the amount petitioner had spent in legal fees constituted misconduct on the prosecutor's part that prejudiced the defense (Tr. 436). The district court, in denying the motion, concluded that the evidence was relevant to petitioner's credibility and showed that petitioner's life style was inconsistent with his protestations of poverty on direct examination (Tr. 437-439). The court nonetheless instructed the jury that there was nothing unusual about the fees mentioned and that the jury should not be prejudiced against petitioner because of the fee paid to his lawyer (Tr. 480).[2]

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the government's question about his attorneys' fees denied him the right to

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[2]The court instructed the jury as follows:

> I want you to seriously pay attention to this. There is nothing whatsoever wrong with having a lawyer come from California to defend this case. It is a perfectly natural thing under the circumstances for a person whose residence is in California to

the effective assistance of counsel. Viewed in context, however, the challenged question was proper cross-examination.

The question about attorneys' fees was part of the line of inquiry designed to show that petitioner enjoyed an expensive lifestyle and possessed substantial financial resources. On direct examination, petitioner had conveyed the impression that he lived very poorly during the period of the conspiracy, borrowing money from his father and living off his family and friends. He also suggested that his financial situation had not changed significantly between 1975 and the present (Tr. 345-412). Accordingly, proof that petitioner was living far above the means indicated by the sources of income to which he admitted was of substantial probative value in impeaching his credibility and suggesting an illicit source of substantial added income. See *United States* v. *Tramunti*, 513 F. 2d 1087 (C.A. 2), certiorari denied, 423 U.S. 823; *United States* v. *Falley*, 489 F. 2d 33 (C.A. 2). His attorneys' fees, like any other major expenditure, were a legitimate subject of inquiry on this score. The district court therefore acted well within its discretion in permitting the question about attorneys' fees.

Contrary to petitioner's contention, the inquiry into attorneys' fees did not constitute a penalty for the exercise of his Sixth Amendment rights. Unlike *United States ex*

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retain local attorneys to come here. This is a federal court. It is a national court. There is nothing wrong with having people investigate or in paying a fee.

A case like this requires a great deal of time, a lot happens outside the courtroom that you're not privy to, and there is nothing unusual about the fees mentioned.

I want to make it absolutely certain that there is no prejudice whatsoever against this defendant because of his attorney who strikes me as being very competent and highly ethical attorney, because he is a California attorney or because he is being paid a fee.

rel. Macon v. *Yeager*, 476 F. 2d 613 (C.A. 3), certiorari denied, 414 U.S. 855, the prosecutor's question did not invite the jury to conclude that petitioner was guilty because he had retained an attorney. The relevance of the question stemmed not from the fact that petitioner had retained counsel, but from the fact that he had been able to pay a substantial fee in spite of his claim on direct examination that he enjoyed only a modest income. Moreover, the trial court carefully instructed the jury that there was nothing wrong or unusual about the fee arrangement. The instruction cured any potential prejudice that may have stemmed from jury speculation about the nature of the fee arrangement.

2. Petitioner argues (Pet. 10-12) that certain comments made by the prosecutor during rebuttal were inflammatory and denied him a fair trial. The court of appeals sharply criticized the prosecutor's remarks, but it concluded that no reversible error was committed, in part because the remarks were provoked by defense counsel's summation. There is no reason for this court to review that determination.

In his summation, defense counsel suggested that the government had tried to "poison the water" against petitioner, had pressured witnesses to testify against petitioner, and had prepared scripts for its witnesses in an effort to secure a conviction (Tr. 483, 489, 491-493). In response, the prosecutor made the following comment (Tr. 513-514):

> Now, Mr. Osterhoudt also implied to you, and I emphasize the word implied, that Gerardi and Caruolo were put up to their testimony by the Government. This is the quote: "It is the truth, as defined by the prosecution." He used the word pressure. He used the word script. He implied we wrote out a script for Gerardi. He memorized it and got up on the stand. He didn't come right out and say

that the Government made them falsely implicate an innocent person. He probably didn't want to offend you because he knew you wouldn't fall for it because it is offensive. But he implied it.

I say that is ridiculous. I suggest again there is absolutely no basis in the record for it. And it should be rejected out of hand.

Don't you think there are enough guilty narcotics dealers in the United States that we don't have to drum up a case against an innocent person? Do you think our salaries depend on whether we convict George Burgio? Why should we do such a thing unless he was guilty?

THE COURT: No.

MR. OSTERHOUDT: That is improper.

THE COURT: Sustained.

You decide the case on the evidence. The Government is not on trial—

MR. APPLEBY: I suggest he put the Government on trial.

THE COURT: If he did I don't want you to make the argument in any event. Go to something else.

As the court of appeals recognized, the prosecutor's argument was improper. Nonetheless, in the context of defense counsel's attack on the integrity of the prosecution, and in light of the court's curative instruction and the strength of the evidence against petitioner, the comment did not deprive petitioner of a fair trial. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 240-242; *United States ex rel. Clark* v. *Fike*, 538 F. 2d 750

(C.A. 7), certiorari denied, 429 U.S. 1064; *United States* v. *Santana*, 485 F. 2d 365 (C.A. 2); *United States* v. *LaSorsa*, 480 F. 2d 522 (C.A. 2), certiorari denied, 414 U.S. 855.[3]

3. Finally, petitioner contends (Pet. 12-15) that the district court's standard instruction on the credibility of a defendant improperly rendered his testimony suspect. The district court gave the following instruction to the jury (Tr. 526):

> The defendant is competent as a witness. He voluntarily took the stand, although he didn't have to. His testimony should not be disbelieved merely because he is a defendant and you may, as in the case of an accomplice, or informer, rely on so much of it as you believe. In weighing his testimony, however, you may consider the fact that he has a vital interest in the outcome of the trial and you may consider his prior statements and explanations of them in assessing his credibility.

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[3]The cases on which petitioner relies as establishing a conflict among the circuits are distinguishable. In *McMillian* v. *United States*, 363 F. 2d 165, 169 (C.A. 5), and *Dunn* v. *United States*, 307 F. 2d 883 (C.A. 5), the court criticized the practice of suggesting that there was other evidence, not presented to the jury, that established the defendant's guilt. In *Hall* v. *United States*, 419 F. 2d 582 (C.A. 5), the court reversed the defendant's conviction on the basis of a whole range of improper comments during summation, for which there was neither provocation nor a curative instruction. And in *Greenberg* v. *United States*, 280 F. 2d 472 (C.A. 1), the United States Attorney similarly engaged in lengthy improper argument, without apparent provocation or correction by the court, and culminating in a long statement of his personal belief in the guilt of the defendant and his own expertise in judging such matters. In this case, by contrast, the statement, albeit improper, was brief; it was quickly corrected by the court; and it was directly responsive to a sharp attack by petitioner's counsel.

This instruction properly informed the jury that petitioner was a competent witness and should not be disbelieved merely because he was a defendant, as well as noting his special interest in the outcome of the trial. It was within the district court's discretion to call the attention of the jury to petitioner's "vital interest," since the fact that he was the defendant created an interest greater than that of any other witness and to that extent affected the question of credibility. This Court approved such an instruction in *Reagan* v. *United States*, 157 U.S. 301, 305-306, noting: "The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, therefore, a matter properly to be suggested by the court to the jury." The majority of the courts that have recently addressed the issue have approved the use of the challenged instruction. See, *e.g.*, *United States* v. *Wiggins*, 566 F. 2d 944 (C.A. 5), certiorari denied, June 5, 1978, No. 77-6400; *United States* v. *Preciado-Gomez*, 529 F. 2d 935, 942 (C.A. 9), certiorari denied, 425 U.S. 953; *United States* v. *Martin*, 525 F. 2d 703, 706-707 (C.A. 2), certiorari denied, 423 U.S. 1035; *United States* v. *Hill*, 470 F. 2d 361, 363-365 (C.A. D.C.).

Contrary to petitioner's suggestion (Pet. 9), the Seventh Circuit has not held that the use of this instruction is error. See *United States* v. *Van Drunen*, 501 F. 2d 1393, 1395-1396 (C.A. 7), certiorari denied, 419 U.S. 1091; *United States* v. *Saletko*, 452 F. 2d 193, 197-198 (C.A. 7), certiorari denied, 405 U.S. 1040. While it has observed that including the defendant in the general instruction on witness credibility, rather than mentioning him separately,

is "a sounder procedure,"[4] the circuit has "continually upheld instructions on this subject," *United States* v. *Saletko, supra*, 452 F. 2d 197-198 and n. 4.

Only the Eighth Circuit has held that the instruction challenged here is error, and that circuit has declined to find the error prejudicial where "[t]he [defendant's] personal interest in the outcome of the trial proceedings was obvious to the jurors, the instruction was not inflammatory and it did not intimate * * * that the [defendant] was a perjurer." *United States* v. *Bear Killer*, 534 F. 2d 1253, 1260 (C.A. 8), certiorari denied, 429 U.S. 846.

Here the instruction simply pointed out the obvious fact that petitioner had a significant interest in the outcome of his trial, and it avoided doing so in an "inflammatory" manner or suggesting that petitioner had committed perjury. This charge was preceded by a caution that the jury should not discount petitioner's testimony just because he was the defendant, and by the instruction that the jury "rely on so much of it as you believe" (Tr. 526). In addition, the judge gave appropriate instructions concerning the presumption of innocence and the government's burden of proof (Tr. 519-520). The result of these instructions, taken as a whole, was that the jury was instructed to subject petitioner's testimony to "the same scrutiny as the testimony of other witnesses with a special interest." See *United States* v. *Hill, supra*, 470 F. 2d at 365. In the circumstances of this case, therefore, even the Eighth Circuit presumably would not have found reversible error, and the case therefore presents no conflict requiring this Court to reconsider its earlier approval of the challenged instruction in *Reagan* v. *United States, supra*.

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[4]The First Circuit in *Carrigan* v. *United States*, 405 F. 2d 1197, 1198, similarly encouraged trial courts to include the defendant in the general credibility instruction as to all witnesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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